Supreme Court, U.S.
FILED

071600 JUN 20 2008

OFFICE OF THE CLERK
William K. Suter, Clerk

No.

IN THE

Supreme Court of the United States

JAMES ALLISON AND FLORA ALLISON, PETITIONERS

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

WILLIAM C. BUDIGAN
Counsel of Record

2601 42nd Ave W
Seattle, WA 98199-3011
(206) 284-5305

Attorney for Petitioners

CURRY & TAYLOR • (202) 393-4141

QUESTIONS PRESENTED

1. Federal Court Jurisdiction: Do the federal courts have jurisdiction to review state court decisions void and unconstitutional because of biased decision makers?

2. Due Process in Jury Selection: Is it a violation of due process for a court not to strike for cause a juror, who is currently insured by, has an ownership interest in, and receives monetary benefits from the Defendant mutual auto insurance company?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT PROVISIONS INVOLVED 3

STATEMENT 7

REASONS FOR GRANTING THE PETITION 9

CONCLUSION 34

APPENDIX

Circuit Court Opinion 1a
District Court Order 5a
Order Denying Petition for Rehearing 12a

TABLE OF AUTHORITIES

Page

CASES

ALEMAN V. JUDGES OF CIRCUIT COURT OF COOK COUNTY, 138 F.3D 302 (7TH GIR. 1998).....21, 22
BAILEY V. TODD, 126 GA. APP. 731, 191 S.E.2D 547, CERT. DEN. 409 U.S. 1113 (1972)..... 29
BELL V. HOOD, 327 U.S. 678, 66 S. CT. 773 (1946).....14, 27
BIDDULPH V. MORTHAM, 89 F.3D 1491, 1495 N.1 (11TH CIR. 1996)..... 23
BRADSHAW V. BYRD, 235 GA. APP. 25, 508 S.E.2D 433 (1998)..... 32
CAREY V. PIPHUS 435 U.S. 247, 98 S.CT. 1042 (1978)..... 34
CHAPMAN V. CALIFORNIA, 386 U.S. 18, (1967)..... 33
CHESTNUT V. FORD MOTOR CO., 445 F.2D 967, 971 (4TH CIR. 1971)..... 30
COHEN V. VIRGINIA, 6 WHEAT 264 (1821)..... 2
DAVANI V. VA. DOT, 434 F.3D 712 (4TH CIR. 2006)..... 15
DC COURT OF APPEALS V. FELDMAN, 460 U.S. 462(1983).....12, 19
DYER V. CALDERON, 151 F.3D 970, 973 N.2 (9TH CIR. 1998)(EN BANC)..... 33
EXXON MOBILE CORP. V. SAUDI BASIC INDUSTRIES CORP., 544 U.S. 280 (2005).....14, 15, 18
FAY V. NOIA, 372 U.S. 391, 441 (1963)..... 12
FEDORINCHIK V. STEWART, 289 MICH. 436, 286 N.W. 673 (1939)..... 31
FRANCONE V. SOUTHERN PAC. CO., 145 F.2D 732 (5TH CIR. 1944)..... 30
GASH ASSOCS. V. VILLAGE OF ROSEMONT, 995 F.2D 726, 728 (CA7 1993).....15, 16, 20
GERSTEIN V. PUGH, 420 U.S. 103, 108 N.9 (1975)..... 12
GETTER V. WAL-MART STORES INC., 66 F.3D 1119 (10TH CIR. 1995)..... 29
GLADHILL V. GENERAL MOTORS CORP., 743 F.2D 1049 (4TH CIR. 1984)..... 30
HILL V. LAMULLE, 506 SO. 2D 690, (LA. APP. 5TH CIR.

1987) 31
HOBLOCK V. ALBANY COUNTY BD. OF ECLECTIONS, 422 F.3D 77 (2D CIR. 2005) 15
HUDSON V. STRIPLING, 261 ALA. 196, 73 SO. 2D 514 (1954) 29
JORDAHL V. DEMOCRATIC PARTY OF VIRGINIA, 122 F.3D 192(4TH CIR. 1997) 18
KOUGASIAN V. TMSL, INC., 359 F.3D 1136, 1140-41 (9TH CIR. 2004) 12
LOHMAN V. GREAT AMERICAN LIFE INSURANCE COMPANY, 478 F.2D 719, 723(8TH CIR. 1973) 15
LONG V. SHOREBANK DEVELOPMENT CORP., 182 F.3D 548, (7TH CIR. 1999) 19
LOUBSER V. THACKER, 440 F.3D, (7TH CIR. 2006) 20, 21, 22
LUGAR V. EDMONSEN OIL COMPANY, 457 U.S. 922, 102 S.CT. 2744 (1982) 13, 26
LYNK V. LAPORTE SUPERIOR COURT NO. 2, 789 F.2D 554, 564-65(7TH CIR. 1986) 20
MANUFACTURED HOME CMTYS., INC. V. CITY OF SAN JOSE, 420 F.3D 1022 (9TH CIR. 2005) 15
MCCOLLUM V. SHUBERT, 185 S.W.2D 48 (MO. APP. 1944) 29
MCCORMICK V. BRAVERMAN, 451 F.3D 382 (6TH CIR. 2006) 14, 15
MONROE V. PAPE, 365 U.S. 167, 5 L. ED. 2D 492, 81 S. CT. 473 (1961) 13, 14
MOORE V. BEZALLA, 241 N.C. 190, 84 S.E.2D 817 (1954) 29
MULLANE V. CENTRAL HANOVER BANK AND TRUST CO., 339 U.S. 306, 314, 70 S. CT. 652, 94 L. ED. 865 (1950) 14
NEDER V. UNITED STATES, 527 U.S. 1, 8 (1999) 33
NESES V. SHEPARD, 68 F.3D 1003, 1005(7TH CIR. 1995) 20, 22
NOEL V. HALL, 341 F.3D 1148, 1164 (9TH CIR. 2003) 15, 16
OLYMPIC STEAMSHIP CO. INC. V. CENTENNIAL INS. CO, 117 WN.2D 37, 811 P.2D 673(1991) 27
PARTINGTON V. GEDAN, 880 F.2D 116 (9TH CIR. 1989) 12
PATTERSON V. LAUDERBACK, 211 GA.APP. 891,

895(3), 440 S.E.2D 63 (1994) 28
PERALTA V. HEIGHTS MEDICAL CENTER, 485 U.S. 80, 108 S.CT. 896(1998) 15, 24
RAINS V. SHCUTTE, 53 ILL. APP. 2D 214, 202 N.E.2D 660 (5TH DIST. 1964) 31
ROBINSON V. ARIYOSHI, 753 F.2D 1468 (9TH CIR. 1984) 16,17, 27
ROOKER V. FIDELITY TRUST CO., 263 U.S. 413, 415-16 (1923) ..... *passim*
ROQUES V. STATE FARM INS. CO., 469 SO. 2D 254 (LA. 1985) 32
SILER V. LOUISVILLE & N. R. CO., 213 U.S. 175 (1909) 3
STATES RES. CORP. V. ARCHITECTURAL TEAM, INC., 433 F.3D 73 (1ST CIR. 2005) 15
STRICKLAND V. WINTERVILLE, 130 GA. APP. 425, 203 S.E.2D 706 (1973) 29
SYNAGOGUE V. CITY OF ENGLEWOOD, 071707 F.3D, 05-5221 (3RD CIR. 2007) 14, 17, 18
TUMEY V. OHIO, 273 U.S. 510 (1927) 33
UNITED STATES V. ALLSUP, 556 F.2D 68,71(9TH CIR. 1977) 33
UNITED STATES V. CAMBARA, 902 F.2D 144, 147 (1ST CIR. 1990) 30
UNITED STATES V. NELL, 526 F.2D 1223, 1229 N.8 (5TH CIR. 1976) 30
UNITED STATES V. RUUSKA, 883 F.2D 262, 268 (3RD. CIR. 1989) 30, 31
VAN HARKEN V. CITY OF CHICAGO, 103 F.3D 1346, 1349 (7TH CIR.1997) 20
VASEY V. MARTIN MARIETTA CORP., 29 F.3D 1460, 1467 (10TH CIR. 1994) 29, 30
WALLACE V. SWIFT SPINNING MILLS INC., 236 GA.APP. 613, 511 S.E.2D 904 (GA.APP. 1999) 28, 29
WARD V. VILLAGE OF MONROEVILLE, 409 U.S. 57, 93 S.CT. 80 (1972) 23
WARREN V. BALLARD, 266 GA. 408, 410 ,467 S.E.2D 891 (1996) 28
WEATHERBEE V. HUTCHESON, 114 GA. APP. 761, 152

S.E.2D 715 (1966) 28, 29
WOOD V. ORANGE COUNTY, 715 F.2D 1543, 1547 (11TH CIR. 1983) 22

STATUTES

CIVIL RIGHTS ACT OF 1871 13
28 U.S.C. §1254(1) 2, 3
28 U.S.C. §1257(a) 2, 4, 33
28 U.S.C §1343(a)(3) & (4) ..... *passim*
28 U.S.C. §1738 ..... 2, 4, 16, 25
28 U.S.C. §2254 (d)(1) 5, 21
42 U.S.C. §1983 ..... *passim*
WASH.REV.CODE § 4.44.170 (1975) 6, 10
WASH.REV.CODE § 4.44.18 (4) (1881) 7, 10

RULES

FED.R.CIV.PROC. 60 15
WASH. CODE OF JUDICIAL CONDUCT CANNON 5 (c)(1) 10

CONSTITUTIONAL PROVISIONS

ART. III SEC. 2 13
ART. VI 22, 24, 25
U.S. CONST. AMEND V 3, 25
U.S. CONST. AMEND VI 3
U.S. CONST. AMEND VII 3
U.S. CONST. AMEND XIV 3, 25
WASH. CONST. AMEND ART I, SEC. 3 6
WASH. CONST. AMEND ART I, SEC. 21 6

OTHER AUTHORITIES

BLACK'S LAW DICTIONARY, 6TH ED. 26, 28

OPINIONS BELOW

[X]For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix 1a - 4a to the petition and is

[] reported at; or,[ ] has been designated for publication but is not yet reported; or, [X]is unpublished.

The opinion of the United States district court appears at Appendix 5a to the petition and is

[] reported at; or, [ ] has been designated for publication but is not yet reported; or, [X]is unpublished.

[X] For cases from **state courts**: This case was originally in the State Courts. See explanation below under Jurisdiction.

JURISDICTION

[X]For cases from federal courts:

The date on which the United States Court of Appeals Ninth Circuit decided my case was February 12, 2008; Appendix
1a – 4a.

[ ]No petition for rehearing was timely filed in my case.

[X]A timely petition for rehearing was denied by the United States Court of Appeals Ninth Circuit on the following date: March 24, 2008, and a copy of the order denying rehearing appears at Appendix 12a .

[ ]An extension of time to file the petition for a writ of certiorari was granted to and including (date) on (date) in Application No.

The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1), §1257(a), §1343(a)(3)&(4), §1738, §2254(d)(1), and 42 U. S. C. §1983.

[x] Additionally, this case involves original judgment and orders from Washington State Courts. For cases from state courts:

The date on which the highest state court decided my case was August 4, 2005. A copy of that decision appears at Appendix E to Petitioner's first Petition For Writ of Certiorari filed in United States Supreme Court No. 77069-7.

The jurisdiction of this Court is invoked under 28 U. S. C. §1257(a) and sections noted above for federal court.

Supreme Court jurisdiction to review a highest state court decision here is invoked by this being a case in law and equity consisting of the right of the parties arising under the Constitution of the United States as its correct decision depends on the construction of the Constitution. Cohen v. Virginia, 6 Wheat 264 (1821). Here, constitutional rights of Allisons arise in a genuine controversy with color of merit which depend upon the effect or construction of the United States Constitution amendments v, vi, vii, and xiv. All issues raised here are reviewable because the rule has long been established that where a federal question is raised and a case is presented arising under the Constitution of the United States a federal court thus having original

or removal jurisdiction thereof also has power, and is authorized, to determine all questions in the case, local as well as Federal. Siler v. Louisville & N. R. Co., 213 U.S. 175 (1909). Relief in this case therefore can be made through the federal courts or by direction to the Washington State Supreme Court, per this Court's jurisdiction.

RELEVANT PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

United States Constitution amendment v: ". . . nor be deprived of life, liberty, or property, without due process of law; . . ."
United States Constitution amendment vi:" . . by an impartial jury of the state. . ."
United States Constitution amendment vii: "Trial by jury and in civil cases. In suits, common law, ...the right of trial by jury shall be preserved . . ."
United States Constitution amendment xiv: "...nor shall any state deprive any person life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

FEDERAL STATUTES

28 U. S. C §1254(1)

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree)

28 U. S. C §1257(a)

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States. "

28 U. S. C §1343(a)(3) and (4)

> (a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
>
> (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

28 U. S. C §1738

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto. The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form. Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

28 U.S.C. §2254 (d)(1)

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

42 U. S. C §1983

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

WASHINGTON STATE CONSTITUTION

Washington State Constitution amendment: article i, sect. 3: "Personal rights. No person shall be deprived of life, liberty or property, without due process of law . . ." Washington State Constitution amendment: article i, sect. 21: "Trial by jury. The right of trial shall remain inviolate..."

WASHINGTON STATE STATUTES

Wash.Rev.Code § 4.44.170 (1975)

> Particular Causes of challenge. Particular causes of challenge are of three kinds:

> (1) For such a bias as when the existence of the facts is ascertained, in judgment of law disqualifies the juror, and which is known in this code as implied bias.

Wash.Rev.Code § 4.44.180(4)(1881)

> Implied bias defined. A challenge for implied bias may be taken for any or all of the following causes, and not be otherwise:
> (1) Consanguinity or affinity within the fourth degree to either party.
> ...(4) Interest on the part of the juror in the event of the action, or the principal question involved therein, excepting always, the interest of the juror as a member or citizen of the county or municipal corporation.

STATEMENT

Prior to the federal court decisions under review here, the state court decisions were sought to be reviewed in this Court under Petitioner's first Petition For Writ of Certiorari filed in United States Supreme Court No. 77069-7. That petition has all of that factual background, decisions, transcripts, etc. regarding the state court proceedings and we refer the Court to that record and briefing.

Petitioner James Allison was involved in an auto accident. His insurance company, State Farm Mutual Automobile Insurance Company (hereinafter State Farm), guessed that it was intentional, wanted to call the incident road rage between the drivers, and denied him coverage. He sued State Farm for coverage. State Farm brought a summary judgment motion and the

district court denied coverage. The superior court reversed. At trial, four of the six-person jury selected (5 needed for decision) were current State Farm Mutual Auto Insurance insureds and the judge allowed them to stay on the jury despite strenuous objection and motions by Petitioner's counsel before the actual trial began. State Farm Mutual Automobile Insurance Company is a mutual insurance company, which by definition, means that its insureds are owners of the company and it is undisputed that most auto insureds pay for their own insurance versus payment by third parties. At trial, the jury agreed that State Farm breached its contract and had to provide coverage, but for only a paltry portion of his losses. This outcome was patently foreseeable given that the majority of the jurors were asked to pass judgement on their own insurance company and award damages against a company they own, share in profits, and benefit from loss reduction. Allisons appealed, seeking a new trial. The superior court summarily denied the appeal and the Washington Court of Appeals and Washington Supreme Court denied review. This case started as a state district court case below Washington's general jurisdiction court, superior court, and such cases only have a right of appeal to superior court and only discretionary review thereafter.

The Allisons sought a Writ of Certiorari from this Court (No. 77069-7), which was denied. Next, Allisons filed in United States District Court Western District of Washington at Seattle and the court dismissed the case. This was appealed to the United States Court of Appeals for the Ninth Circuit and that court affirmed. En Banc Rehearing was denied. This petition was filed timely.

REASONS FOR GRANTING THE PETITION

The Court should grant writ of certiorari here because:

1. *CONFLICT AMONG THE CIRCUITS REGARDING ROOKER/FELDMAN AND OTHER FEDERAL JURISDICTIONAL ISSUES*

This case involves questions of exceptional importance regarding federal court jurisdiction and the constitutional right to unbiased juries. The decision of the Ninth Circuit denying Allisons' case jurisdiction in federal court is in conflict with decisions of this Court, its own Ninth Circuit decisions, and that of the Third, Fourth, and Seventh Circuits. Review by this Court is therefore necessary to secure and maintain uniformity with access to federal courts and their ability to review State Court decisions contrary to federal law and the Constitution.

2. *NEED FOR US SUPREME COURT GUIDANCE ON JURY BIAS.*

There are no United States Supreme Court cases on point and the Court should clarify that the Constitution requires the right to impartial juries should be inviolate and jurors who are policyholders of a defendant mutual insurance company are per se disqualified for challenge. This issue affects hundreds of millions of insureds who potentially face their own insurance companies in court.

1. CONFLICT AMONG THE CIRCUITS REGARDING ROOKER/FELDMAN AND OTHER FEDERAL JURISDICTIONAL ISSUES

A. Federal Courts Have Jurisdiction to Review the Biased State Jurors' Void, Unconstitutional Decisions.

The federal courts have jurisdiction to review state court decisions made by impartial decision makers. Review is not barred by the Full Faith and Credit Clause, collateral estoppel, law of the case, Rooker/Feldman case law, and the state court actions involved are state action evoking federal review. The jury issues here are constitutional and affect all federal rights.

Here, the jury was the decision maker and was undisputedly financially linked to State Farm. Its decision is void and should not be given full faith and credit. Clearly, Washington law and that of all state and federal courts hold, as in Washington State Code of Judicial Conduct Cannon 5 (C) (1), that judges should refrain from financial and business dealings that tend to reflect adversely on their impartiality, interfere with the proper performance of their judicial duties or exploit their judicial position. Here, the jury is held to the same standard as the decision maker and impartiality is statutorily required. See Wash. Rev. Code § 4.44.170 (1975), "Particular causes of challenge are of three kinds:

(1) For such a bias as when the existence of the facts is ascertained, in judgment of law disqualifies the juror, and which is known in this codes as implied bias." See also Wash.Rev.Code § 4.44.180(4)(1881), "A

challenge for implied bias may be taken for any or all of the following causes, and not be otherwise:

(1) Consanguinity or affinity within the fourth degree to either party.

...(4) Interest on the part of the juror in the event of the action, or the principal question involved therein..."

An example of this decision maker bias is the classic kangaroo court in the Third World where the defendant's family or partners preside over the adjudication of the plaintiff's claim—Saddam Hussein's brother deciding Saddam's case. Or for that matter if Donald Trump's Federal Judge sister were to decide one of his cases. The fact other appellate judges affirm the biased tribunal's judgment does not remove it from collateral attack. Here, all the reviewing state courts summarily denied review, but the original trial decision remains void. State Farm simply cannot have its insureds decide a case against it. Here, the jurors were related financially and contractually with State Farm and were undisputedly biased. They should have clearly been stricken from the jury for challenge, and had their decision declared void.

This case involves issues of national importance for all using our courts and is particularly important to federal courts for their jurisdiction and to all courts using juries for standards of impartial jury selection.

The Panel Decision Here is Contrary to US Supreme Court and Circuit Court of Appeals Decisions Rejecting State Farm's Rooker-Feldman Contention That a Party's 42 U S C § 1983 Claim for Deprivation of Procedural Due Process by State Adjudicatory Procedures is Inextricably

Intertwined With the State Court Judgment and Ruling In Favor Of District Court Jurisdiction

Supreme Court Cases

The Ninth Circuit panel decision here affirmed the district court decision that it lacked jurisdiction under Rooker-Feldman [Rooker v. Fidelity Trust Co., 263 U.S. 413(1923) and DC Court of Appeals v. Feldman, 460 U.S. 462(1983)]. The panel reasoned that Allisons' claims were already considered and rejected on direct appeal in the state court system, making the ruling that if one raises issues in the state court, it cannot be raised again in federal court unless it is a case of allegation of extrinsic fraud in the state court, citing Kougasian v. TMSL, Inc., 359 F.3d 1136, 1140-41 (9th Cir. 2004)(concluding that a suit alleging extrinsic fraud in a state court suit is not barred by Rooker-Feldman).

First, this very narrow view of federal court review limited to only extrinsic fraud is contrary to prior Supreme Court rulings supporting federal jurisdiction to remedy state wrongs. Federal courts have jurisdiction when state courts clearly do not enforce constitutional rights. "If the States withhold effective remedy, the federal courts have the power and the duty to provide it." Fay v. Noia, 372 U.S. 391, 441 (1963). "If a federal plaintiff cannot raise his federal claim in the state proceedings because state procedures do not afford him the opportunity to do so then abstention is not appropriate. See e.g., Gerstein v. Pugh, 420 U.S. 103, 108 n.9 (1975)." Partington v. Gedan, 880 F.2d 116 (9th Cir. 1989).

Second, jurisdiction exists under Article III of the Constitution and 28 U.S.C. § 1343 (a)(4) to hear Allisons' Section 1983 claim to remedy State Farm's use

of Washington common law to obtain a jury of its policy-holder/owners. Article III, Section 2 of the Constitution provides federal judicial power exists under all cases arising under the Constitution, Laws, and Treaties of the United States. Congress has provided federal jurisdiction without any amount of controversy for all cases asserting a claim under a statute of the United States providing remedy for deprivations of civil rights. 28 U.S.C. § 1343 (a). There is federal subject matter jurisdiction to hear Allisons' claim.

The fact the Constitution does not require the States to provide for resolution of civil cases by jury does not mean those States such as Washington that employ juries in civil trials are free to dispense with the procedural due process requirement of unbiased jurors. Having chosen to provide for resolution of civil cases by jury, Washington must provide procedures to ensure the jurors do not have a financial interest in a party to the case they must decide.

A party who avails itself of a facially unconstitutional state procedure is clothed with state action under 42 USC Section 1983. Lugar v. Edmonsen Oil Company, 457 U.S. 922, 102 S.Ct. 2744 (1982).

State Farm asserts that conduct unlawful under state law does not necessarily violate the Constitution. However, where it does so, the remedy is determined by the Constitution, not necessarily only state law. Murder, extortion, and arson were all crimes and torts under the law of the Southern states during the Ku Klux Klan's state reign of terror in the Reconstruction South when the Civil Rights Act of 1871 was passed. Monroe v. Pape, 365 U.S. 167, 5 L. Ed. 2d 492, 81 S. Ct. 473 (1961). Section 1983 supplied a federal remedy for deprivations of those federal rights that was

supplementary to the state remedies. The state remedy need not be sought in order to assert the federal remedy. Id.

The blithe manner in which State Farm dismisses trial by a biased tribunal is troubling. If the Section 1983 federal remedy does not apply to a state trial by jury with jurors who own State Farm, then it has little reality or worth. Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950). There is subject matter jurisdiction under the civil rights jurisdictional statute to determine the merits of the claim. 28 U.S.C. § 1343 (a)(4); Bell v. Hood, 327 U.S. 678, 66 S. Ct. 773 (1946) (federal jurisdiction exists to resolve the merits of any action asserting a federal claim unless the federal claim is so wholly insubstantial as to be frivolous). Allisons' claim is not wholly insubstantial or frivolous.

Third, the Ninth Circuit panel decision here relies upon non-determinative analysis of whether or not the issues here are intertwined with a state decision. The Supreme Court obviated this confusing factor in determining federal jurisdiction in Exxon Mobile Corp. v. Saudi Basic Industries Corp., 544 U.S. 280 (2005). In Synagogue v. City of Englewood, 071707 F.3d, 05-5221 (3rd Cir. 2007), the court stated:

> It is worth mentioning, however, that the Exxon Court, noted but did not discuss "inextricably intertwined," relegating Feldman's use of that phrase to a mere "expression." Id. At 286 and n.1. There is little reason to believe that "inextricably intertwined" after Exxon does anything more than state a conclusion or describe a claim that meets the requirements of Exxon. See, e.g., McCormick v. Braverman, 451

F.3d 382 (6th Cir. 2006); Davani v. Va. DOT, 434 F.3d 712 (4th Cir. 2006); States Res. Corp. v. Architectural Team, Inc., 433 F.3d 73 (1st Cir. 2005); Hoblock v. Albany County Bd. Of Eclections, 422 F.3d 77 (2d Cir. 2005); Manufactured Home Cmtys., Inc. v. City of San Jose, 420 F.3d 1022 (9th Cir. 2005).

According to the Supreme Court in Exxon: "If a federal plaintiff present[s] some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party... then there is jurisdiction... GASH Assocs. v. Village of Rosemont, 995 F.2d 726, 728 (CA7 1993); accord, Noel v. Hall, 4341 F.3d 1148, 1163-1164 (CA9 2003)."

This case is controlling and the Supreme Court has spoken that even if Allisons get a remedy of voiding the state court judgment there is still jurisdiction in the federal court to hear the independent claims of constitutional violation. A party who takes a judgment without procedural due process must start anew even if the result would be the same. Peralta v. Heights Medical Center, 485 U.S. 80, 108 S.Ct. 896(1998). See Lohman v. Great American Life Insurance Company, 478 F.2d 719, 723(8th Cir. 1973)(affirming Fed.R.Civ.Proc. 60 (b) order vacating prior judgment for want of due process).

Ninth Circuit Cases in Conflict with Themselves

The Ninth Circuit Court of Appeals' decision to deny jurisdiction here is definitely in conflict with its earlier decisions and it needs direction from the Supreme Court. The Ninth Circuit previously ruled that if a federal appellant asserts as a legal wrong an

illegal act or omission of the adverse party, Rooker-Feldman does not bar jurisdiction. Noel v. Hall, 341 F.3d 1148, 1164 (9th Cir. 2003). In Noel, the Ninth Circuit court found the statement of the doctrine made by the Seventh Circuit controlling:

> The Rooker-Feldman doctrine asks: is the federal appellant seeking to set aside a state court judgment or does he present some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party? If the former, then there is district court jurisdiction and state law determines whether the defendant prevails under principles of claim preclusion [under 28 U.S.C. § 1738].

GASH Associates, Inc. v. Village of Rosemont, 995 F.2d 726, 728-29 (7th Cir. 1993). Noel v. Hall, 341 F.3d at 1164.

Here, the injury to Allisons was caused by State Farm's use of Washington common law (the trial court's decision) that deprived Allisons of an unbiased jury and instead forced them into a trial before four of the six jurors who were policyholders/owners of State Farm.

Rooker-Feldman has no application here as Allisons had no full and fair opportunity to litigate the lack of a neutral decision maker in the Washington courts because of the common law imposition of the State court's holding in the case. Robinson v. Ariyoshi, 753 F.2d 1468 (9th Cir. 1984)(Rooker/Feldman does not deprive federal court of jurisdiction where Hawaii Supreme Court denied granting rehearing about the due process implications of its decision to supplant

plaintiff's Hawaii territorial law riparian rights with those of common law of England).

Here, the Washington Supreme Court's denial of Allisons' federal constitutional objections to the biased jury did not provide Allisons with the full and fair opportunity required to litigate their federal claim, in the same manner as the denial of rehearing by the Hawaii Supreme Court in Robinson. Allisons' federal constitutional claim has nothing to do with the insurance claim brought to trial except as an item of actual damage if a neutral tribunal finds they are entitled to full compensation. It is important to note that the panel decision analysis of the Rooker-Feldman issue ignores many of the factors the other Circuit Courts of Appeal used to allow jurisdiction, as discussed below, and misses the point that there has to be a mechanism for review of state court decisions that are contrary to the Constitution.

The Ninth Circuit Panel Decision is in Conflict with Other Circuits, Giving Ninth Circuit Residents Less Protection Under the Constitution

Third Circuit Cases

The Third Circuit allows federal review of State decisions lacking reasonable review of allegations of constitutional violations. The court in Synagogue v. City of Englewood, supre, held:

> ...the injury complained of is the injury caused by the Planning Board when it determined that, for whatever reasons, limitations should be placed on East Hill's use of tents, a determination that the state court merely

> accepted but neither actually litigated nor even analyzed as a First Amendment or RLUIPA claim.[1] The District Court erred in invoking Rooker-Feldman to dismiss the complaint for lack of subject matter jurisdiction.

As noted in the above analysis of Supreme Court cases, Synagogue ruled that analysis of claims as "inextricably intertwined," is misleading and unnecessary under Exxon and the true test is whether or not the federal claim arises after reasonable, constitutionally based review in state court.

Fourth Circuit Cases

The court in Jordahl v. Democratic Party of Virginia, 122 F.3d 192(4th Cir. 1997) stated: "A distinction must be made between actions seeking review of the state court decisions themselves and those cases challenging the constitutionality of the process by which the state court decisions resulted. For example, in Feldman, the Court recognized that the plaintiff was allowed to challenge the constitutionality of a rule under which he had been denied admission to the bar..."

Here, the challenge is to the constitutionality of the state court jury selection process, empanelling jurors who are shareholders in the defendant. This case is a challenge to the constitutionality of the process by which the Washington State Court decision came about -- how it could possibly be constitutional to put State Farm policyholders/owners on the jury.

Seventh Circuit Cases

Rooker/Feldman is an extremely narrow doctrine riddled with exceptions and limitations.

Long v. Shorebank Development Corp., 182 F.3d 548, (7th Cir. 1999), involved in a suit for damages for unlawfully evicting from a home in violation of various federal and state laws. The district court granted a motion to dismiss concluding that the Rooker/Feldman doctrine precluded the court from exercising subject matter jurisdiction. The Seventh Circuit reversed, analyzing all of the same issues here (Rooker/Feldman, collateral estoppel, res judicata, state action, etc. and very informatively for the instant case), in favor of federal jurisdiction prevailing, and stated:

> Under the Rooker/Feldman doctrine, lower federal courts do not have subject matter jurisdiction over claims seeking review of state court judgments. See Rooker v. Fidelity Trust Co., 263 U.S. 413, 415-16 (1923); DC Court of Appeals v. Feldman, 460 U.S. 462, 482-86 (1983). Rooker/Feldman requires a party seeking review of a state court judgment or presenting a claim that a state judicial proceeding has violated their constitutional rights to pursue relief through the state court system and ultimately to the Supreme Court. The pivotal inquiry is "whether the federal plaintiff seeks to set aside a state court judgment or whether he is, in fact, presenting an independent claim." ...In this regard, we have recognized a distinction between "a federal claim alleging injury caused by a state court judgment" and "a federal claim alleging a prior injury that a state court failed to remedy."... A federal court is precluded from considering the former, but not the latter, under

> the Rooker/Feldman doctrine. ...An issue cannot be inextricably intertwined with a state court judgment if the plaintiff did not have a reasonable opportunity to raise the issue in state court proceedings. Absent such an opportunity, it is impossible to conclude that the issue was inextricably intertwined with the state court judgment.

Several Seventh Circuit cases are in conflict with the Ninth Circuit decision here: The Rooker-Feldman doctrine does not preclude a federal claim that the people involved in the state court decision violated the plaintiff's independent right to a fair tribunal. Loubser v. Thacker, 440 F.3d, (7th Cir. 2006) (a state divorce litigant's Section 1983 action for deprivation of her procedural due process right to an impartial tribunal because a conspiracy between the judge and interested parties was not precluded by Rooker-Feldman, res judicata, or collateral estoppel from asserting her federal claim); Neses v. Shepard, 68 F.3d 1003, 1005(7th Cir. 1995)(holding plaintiff's claim that conspiracy between state court judges and opposing attorneys in state breach of contract claim was not barred by Rooker-Feldman); Lynk v. LaPorte Superior Court No. 2, 789 F.2d 554, 564-65(7th Cir. 1986)(holding federal jurisdiction existed to hear prisoner's claim that Indiana statute was interpreted to preclude him from appearing at divorce hearing). Van Harken v. City of Chicago, 103 F.3d 1346, 1349 (7th Cir.1997)(a federal plaintiffs' action seeking a declaration that the process under which parking charges were imposed was constitutionally inadequate, was not barred by Rooker-Feldman); and GASH Assocs. v. Village of Rosemont, 995 F.2d 726, 728 (CA7 1993) (If a federal plaintiff

presents some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party, then there is jurisdiction). That is precisely the Allisons' claim here: the Washington courts interpreted that jurors with a financial interest in the outcome are not precluded from sitting as decision makers. Assume someone seeks enforcement of a judgment against a defendant company with assets. Assume the judgment was entered by a judge with an ownership interest in the defendant company. No question the judgment would be void for impartial judge and not be given full faith and credit outside its jurisdiction. Here, judgment of the State District Court on a verdict rendered by four of six jurors with an identifiable, ownership interest in State Farm is a travesty of justice. It never had real substantive review in the state courts and was rubber stamped to uphold the state's own rulings and jurisdiction exists in the federal courts to review these constitutional violations.

Allisons' complaint of a trial by a biased jury of four owners of the defendant is the same as the corrupt decision maker involved in Loubser. Like the prisoner denied a necessary appearance in his Indiana divorce action, Allisons had no reason to anticipate that the Washington courts, with State Farm's urging, would allow State Farm to obtain a trial before four jurors with an ownership interest in the insurer.

For another example, in Aleman v. Judges of Circuit Court of Cook County, 138 F.3d 302 (7th Cir. 1998), Harry Aleman successfully bribed a Cook County Circuit Judge to acquit him of a murder charge in a 1977 bench trial and then argued double jeopardy after it was found out. The Seventh Circuit accepted review and stated: "Under 28 U.S.C. §2254 (d)(1), we

can only grant Aleman's petition [challenging his indictments] if one of the Circuit Court's legal rulings was either 'contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States..." The court found this to be the case and asserted jurisdiction despite the state court binding decisions, facially to be given full faith and credit by all other courts. Here, Washington State Courts allowing biased decision makers (the jurors in Allison's case, like the bribed judges in Aleman, Loubser, and Neses) is clearly and convincingly contrary to federal law.

Eleventh Circuit Cases

The limitation on the applicability of Rooker/Feldman was first set forth in Wood v. Orange County, 715 F.2d 1543, 1547 (11th Cir. 1983):

> The [Rooker/Feldman doctrine] can apply only where the plaintiff had a reasonable opportunity to raise his federal claim in state proceedings. Where the plaintiff has had no such opportunity, he cannot fairly be said to have "failed" to raise the issue. Moreover, an issue that a plaintiff had no reasonable opportunity to raise cannot properly be regarded as part of the state case. In Feldman's language, the issue that such a plaintiff asks the federal court to decide is not "inextricably intertwined" with the state court's judgment. As a result, the federal district court's jurisdiction does not trench on the exclusive authority of the Supreme Court to review state court decisions for errors of federal law. . . . Finally, interpreting Rooker to preclude a

> federal district court from considering an issue that the plaintiff had no reasonable opportunity to raise in state court might pose due process problems. Such a harsh rule might deprive the plaintiff from any forum, state or federal, where he has a reasonable opportunity to present his federal constitutional claims, a result arguably contrary to the requirements of due process.

See also, Biddulph v. Mortham, 89 F.3d 1491, 1495 n.1 (11th Cir. 1996) (concluding that state court denial of mandamus relief on the same claims raised by plaintiff precluded applicability of Rooker/Feldman doctrine because plaintiff did not have a reasonable opportunity to raise his federal claim in the mandamus proceeding).

Collateral Estoppel is not a Bar to Jurisdiction Here

Collateral estoppel does not bar review of a judgment obtained without due process as this judgment is void and subject to attack at any time. There are two components to this argument. First, the Washington courts denied Allisons' procedural due process right to an impartial decision maker. Second, the procedural component of the due process of law guaranteed by the Fourteenth Amendment against state action requires the decision maker in adjudication be impartial. Ward v. Village of Monroeville, 409 U.S. 57, 93 S.Ct. 80 (1972)(Ohio Village traffic ticket adjudication presided over by Mayor is denial of due process right to impartial decision maker because a substantial portion of the revenue of the Village came from traffic fines).

A Texas judgment debtor who was not served with process filed a motion to vacate the collection

judgment obtained. The court in Peralta v. Heights Medical Center, 485 U.S. 80, 108 S.Ct. 896 (1988), ruled the judgment in favor of State Farm was void for want of due process. The Texas district court denied the motion to vacate the judgment because the debtor could not establish he had a meritorious defense, which was the Texas procedural requirement for vacating a judgment. The Texas Court of Appeals affirmed. The significant fact of Peralta is that the debtor had no defense to the collection claim. If the judgment were vacated and the debtor served, the result of the case would have still been the same, as there was no defense. Nevertheless, the Supreme Court reversed the denial of the motion to vacate the default judgment, stating:

> When a person is deprived of property in a manner contrary to the most basic tenets of due process "it is no answer to say that in his particular case due process of law would have lead to the same result because he had no defense on the merits. ... [O]lny 'wip[ing] the slate clean ... would have restored the appellant to the position he would have occupied had due process of law been accorded him in the first place."

The Due Process Clause demands no less in this case.

The Full Faith and Credit Clause is Not a Bar to Federal Review

The full faith and credit clause of Article VI applies only to states. Congress has required federal courts to give full faith and credit to state judgments by

statute. 28 U.S.C. § 1738. There is a substantial line of cases interpreting the full faith and credit clause of Article VI of the Constitution, holding that the Fourteenth Amendment precludes states from giving full faith and credit to foreign state judgments taken without due process of law. The Fifth Amendment guaranty of due process of law is applicable to federal courts. It precludes the federal court from giving full faith and credit to a state judgment taken without due process of law in the same manner as the Fourteenth Amendment precludes states from doing so. A foreign court's denial of a claim of procedural due process itself does not bind the forum court from deciding the issue. This is the law of full faith and credit. Here, the federal courts have jurisdiction to and are not precluded by full faith and credit from ruling on Allisons constitutional and US statutory rights violated by the state court State Farm jurors' void judgment even if the higher state courts let the void judgment stand. An impartial decision is void and no to be given full faith and credit under any circumstance and the federal courts have the power to hear cases to right the constitutional wrong even if a Washington State Courts actions sanction it by State Farm.

State Action is Involved Here

The substantive or jurisdictional basis for federal court involvement is the Civil Rights Act of 1871. 42 U.S.C. § 1983. The statute extends a right of action in law and equity to a person who suffered a deprivation of the plaintiff's constitutional rights by another person acting under color of state law. Congress expressly provided federal jurisdiction for

such claims under 28 U.S.C. § 1343 (a) without any amount of controversy.

Allisons brought an action in the U.S. District Court for deprivation of their property interest without a neutral tribunal guaranteed by procedural due process of the Fourteenth Amendment. State Farm was named as a defendant and is clothed with state action by its use of the Washington common law to obtain a trial by a jury of its policy-holder/owners. Lugar v. Edmonsen Oil Company, 457 U.S. 922, 102 S.Ct. 2744 (1982) (holding creditor that avails itself of state statute dispensing with pre-deprivation notice and hearing required by procedural due process is a state actor liable under 42 USC Section 1983). The State Superior Court's affirmance and the denial of review by the Washington Court of Appeals and Washington Supreme Court is a part of the common law of the State of Washington. See Black's Law Dictionary, "Common Law", pp. 345-46 (Rev. 4th Ed. 1968) ("'common law' is a part of positive law... of any state or nation which is of general and universal application ..."). Here, State Farm obtained the outcome determinative benefit of a trial by four of its owners on the six person jury from the Washington common law rule that such did not deprive plaintiffs of a trial by a neutral decision maker. State Farm is clothed with sufficient state action to subject it for Section 1983 for packing the jury with its own insureds under color of the court's ruling to deprive Allisons of their constitutional right to a fair jury.

The Lower Federal Courts Improperly Dismissed

Here, the dismissal was for want of jurisdiction. A complaint may be dismissed for lack of federal

jurisdiction only when the federal claim is "immaterial and made for the purpose of obtaining jurisdiction or wholly insubstantial and frivolous." Bell v. Hood, 327 U.S. 678, 66 S.Ct. 773 (1946).

This case is not frivolous, involves the inviolate constitutional right to impartial decision makers, and to the Allisons it is worth more than the allegation of undisputed losses over $75,000 in damages, fees and costs under Washington law in Olympic Steamship Co. Inc. v. Centennial Ins. Co, 117 Wn.2d 37, 811 P.2d 673(1991) (granting reasonable attorneys fees and costs to insureds who have to sue their insurance company for coverage and prevail, as Allisons did here) and certainly under the priceless constitutional rights involved.

State Farm has encouraged and benefited from the Washington courts' decisions to allow four of its owners on the six person jury deciding the case against it. The Washington District Court and Superior Court did not really consider the federal constitutional issues raised by this decision, and summarily denied review. This was the same as the Supreme Court of Hawaii's refusal to grant a rehearing on the due process implications of its decision to supplant plaintiff's riparian rights under Hawaii territorial law with the non-existent rights of the English common law, which this court held did not deprive the federal district court of jurisdiction under Rooker-Feldman. Robinson, supra. There, the Ninth Circuit stated it was "loathe to grant less constitutional protection where plaintiffs responsibly exercised an opportunity to raise their claims and have been turned away from the state tribunal without so much as an explanation." Robinson at 1473. However, the Ninth Circuit did so in the instant case. It turned its back on its own precedent

and, in conflict with several of the other circuits, lost its way in claiming a lack of Federal jurisdictional authority and allowed to stand a sad joke of a void state biased jury decision. The circuit courts need the Supreme Court's guidance in understanding the Federal Courts' true jurisdiction to correct such constitutional wrongs by state courts upholding such wrongs.

2. PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED BECAUSE THE JURY SEATED WAS BIASED PER SE BY HOLDING POLICIES OF OWNERSHIP, SHARING IN PROFIT AND LOSSES, OF DEFENDANT MUTUAL INSURANCE COMPANY.

As the court in Wallace v. Swift Spinning Mills Inc., 236 Ga.App. 613, 511 S.E.2d 904 (Ga.App. 1999): stated at n.2:

> A mutual insurance company is one that does not issue capital stock, so that "the policy-holder has an interest in the assets of the company, usually realized by the way of dividends reducing the policy premium[.]" Weatherbee v. Hutcheson, supra at 76. See also Patterson v. Lauderback, 211 Ga.App. 891, 895(3), 440 S.E.2d 63 (1994), overruled on other grounds, Warren v. Ballard, 266 Ga. 408, 410 ,467 S.E.2d 891 (1996): Black's Law Dictionary, 6th ed., p. 1021. However, these policy-holders also may be liable for any judgment against the insurance company. Patterson v. Lauderback, supra.

The Wallace, supra, court held that jury panelists with a relationship to an insurance company that has demonstrable, direct financial interest as insurer in the case, such as employees, officers, stockholders, policy-holders of mutual insurance companies, or family members of someone in those prohibited categories, may not be impartial, and should be removed from panel for cause. Wallace v. Swift Spinning Mills, Inc., 236 Ga. App. 613, 511 S.E.2d 904 (1999).

Courts in the vast majority of cases have taken the position that juror policyholders of mutual insurance companies are subject to challenge for cause, based on having a direct pecuniary interest in litigation in which the insurer has an interest in the outcome. For example, see state cases: Hudson v. Stripling, 261 Ala. 196, 73 So. 2d 514 (1954); Bailey v. Todd, 126 Ga. App. 731, 191 S.E.2d 547, cert. den. 409 U.S. 1113 (1972); Strickland v. Winterville, 130 Ga. App. 425, 203 S.E.2d 706 (1973); Weatherbee v. Hutcheson, 114 Ga. App. 761, 152 S.E.2d 715 (1966); Moore v. Bezalla, 241 N.C. 190, 84 S.E.2d 817 (1954); McCollum v. Shubert, 185 S.W.2d 48 (Mo. App. 1944).

Also for example, see federal cases:

> In Getter v. Wal-Mart Stores Inc., 66 F.3d 1119 (10th Cir. 1995) the court stated:
>
> In our recent Vasey [Vasey v. Martin Marietta Corp., 29 F.3d 1460, 1467 (10th Cir. 1994)] decision, we noted that "courts have presumed bias in extraordinary situations where a prospective juror has had a direct financial interest in the trial's outcome." Id. at 1468. As examples of such extraordinary situations, we

> cited a case in which a prospective juror was a stockholder in or an employee of a corporation that was a party to the suit. Id. (citing Gladhill v. General Motors Corp., 743 F.2d 1049 (4th Cir. 1984): Francone v. Southern Pac. Co., 145 F.2d 732 (5th Cir. 1944)). "In these situations, the relationship between the prospective juror and a party to the lawsuit 'point[s] so sharply to bias in [the] particular juror' that even the juror's own assertions of impartiality must be discounted in ruling on a challenge for cause." Id. (quoting United States v. Nell, 526 F.2d 1223, 1229 n.8 (5th Cir. 1976))....Gladhill, 743 F.2d at 1050("'That a stockholder in a company which is [a] party to a lawsuit is incompetent to sit as a juror is so well settled as to be black letter law.'") (quoting Chestnut v. Ford Motor Co., 445 F.2d 967, 971 (4th Cir. 1971)).

In the instant case, the trial court denied challenges for cause for the four State Farm insureds contrary to Petitioner's United States Constitution due process rights to an impartial jury, over strong clear objections. This ruling also violated his Washington constitutional rights to an impartial jury and statutes requiring the same, quoted earlier above. An erroneous denial of a challenge for cause is reversible error because it forces the litigant to exercise a peremptory challenge. Some circuits consider the loss of a peremptory challenge per se reversible error. See, e.g. United States v. Cambara, 902 F.2d 144, 147 (1st Cir. 1990) (stating that "restricting a defendant's use of the lawful number of peremptory challenges is reversible error if a challenge for cause is erroneously denied"); United States v. Ruuska, 883 F.2d 262, 268 (3rd. Cir.

1989) ("[T]he denial or impairment of the right to peremptory challenges is reversible error per se....[It] cannot be dimissed as harmless.") (citations omitted).

In Fedorinchik v. Stewart, 289 Mich. 436, 286 N.W. 673 (1939), the court concluded that a trial court had erred by not permitting the plaintiff's counsel to question prospective jurors as to whether they or their spouses owned such policies. The court ruled a court abuses its discretion when it places limitations that effectively exclude the discovery of facts that would constitute grounds for challenge for cause. Here, the court limited petitioner to 20 minutes and did not allow follow up questions about bias after denying the challenges.

In Rains v. Shcutte, 53 Ill. App. 2d 214, 202 N.E.2d 660 (5th Dist. 1964), the trial court improperly denied the plaintiff's motion to exclude the five policyholders or to permit examination of each on their voir dire. The court determined that the uncontradicted evidence that the company was a mutual insurance company, in which policyholders shared profits, had been sufficient to satisfy the requisite of good faith necessary to establish the right to examine the prospective jurors or to exclude them outright.

State Farm Mutual Automobile Insurance Company is no stranger to this issue of per se challenged jurors who are policyholders in a mutual insurance company and knew full well from prior court rulings that such jurors are excluded. See, e.g., Hill on behalf of Hill v. Lamulle, 506 So. 2d 690, (La. App. 5th Cir. 1987), where the court concluded that policyholders of mutual insurance companies are disqualified from serving as jurors in cases in which the insurer has a financial interest. The court determined that this is true where it has been established that the company

issuing the juror's policy was in fact a mutual insurance company. There, the trial court had questioned the jurors as to whether any were insured by "State Farm", but failed to ascertain whether the policies of those who answered in the affirmative were insured by State Farm Mutual Automobile Insurance Company, a defendant in that case, or State Farm Fire and Casualty Company, a stock company not involved in the case. Relying on Roques v. State Farm Ins. Co., 469 So. 2d 254 (La. 1985), which involved a similar issue concerning the same insurance companies, except that the stock insurance company had been the defendant, the court concluded that a challenge per se does not lie against a policyholder of a defendant insurance company, at least where the defendant is a stock company, but does lie against a mutual insurance company. In the instant case, the court itself inquired among the jurors regarding State Farm Mutual Automobile Insurance Company specifically, the named defendant in the case and the jurors identified themselves. State Farm knows full well of these rulings specifically concerning its mutual insurance company and failed to disclose these rulings to the trial court here (nondisclosure by defendant's counsel definitely stating whether an insured involved in a case was a mutual company is sufficient ground alone for plaintiff's counsel to strike the juror for cause, Bradshaw v. Byrd, 235 Ga. App. 25, 508 S.E.2d 433 (1998)) and the remedy should not only be a new trial, but State Farm should pay all of the Petitioner's attorneys fees and costs incurred in this matter from the date of voir dire forward.

The Issue of Impartial Jury Selection is of Importance to the Nation and Needs to be Decided Uniformly

In Dyer v. Calderon, the court noted the similarities to a biased judge and biased jurors and stated that "[t]he presence of a biased juror cannot be harmless; the error requires a new trial without a showing a actual prejudice." Dyer v. Calderon, 151 F.3d 970, 973 n.2 (9th Cir. 1998)(en banc)(citing United States v. Allsup, 556 F.2d 68,71(9th Cir.. 1977). Indeed, trial before a biased judge is an archetypal example of a constitutional error that necessarily renders a trial fundamentally unfair and, for that reason, is not amenable to harmless error analysis. See Neder v. United States, 527 U.S. 1, 8 (1999) (noting that the Supreme Court has found "and error to be 'structural', and thus subject to automatic reversal, only in a 'very limited class of cases'," and citing Tumey v. Ohio, 273 U.S. 510 (1927), for the proposition that trial before a biased judge presents such a case). As the Court in Chapman v. California, 386 U.S. 18, (1967) observed, "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." 386 U.S. at 23 n. 8 citing Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L. Ed. 749(1927)(adjudication by biased decision maker).

Relief Sought

The United States Supreme Court can reverse the state court judgment. 28 U.S.C. § 1257. Allisons' remedy is also their 42 USC Section 1983 right to declare the judgment by the biased jury void and their right to recovery of their attorney's fees and expenses incurred in setting aside the biased, void judgment. An additional item of actual damage proximately denied to Allisons, and a part of the Section 1983 damage remedy, is the fair amount of their underlying insurance claim

from State Farm. A fair jury trial on that claim is necessary to determine if State Farm's deprivation of procedural due process caused Allisons that amount of damage. Carey v. Piphus 435 U.S. 247, 98 S.Ct. 1042 (1978).

CONCLUSION

The petition for writ of certiorari should be granted and Allisons awarded reasonable attorneys fees and costs under all possible theories of relief.
Respectfully submitted,

William C. Budigan
Attorney for Allisons

2601 42ND AVE W
SEATTLE, WA 98199-3011
(206) 284-5305

(any footnotes trail end of each document)

No. 06-35788
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES ALLISON; FLORA ALLISON,
Plaintiffs - Appellants,
v.
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Defendant - Appellee.

February 7, 2008 ** , Submitted, Seattle, WashingtonFebruary 12, 2008, Filed

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

MEMORANDUM *

Before: FISHER, GOULD, and IKUTA, Circuit Judges.

This appeal concerns a lawsuit filed by the Appellants James and Flora Allison ("the Allisons") against Appellee State Farm Mutual Automobile Insurance Company ("State Farm") in state court in Washington State. In the state court action, the Allisons asserted insurance coverage of State Farm after an accident. During jury selection in that case, the Allisons objected to participation of four jurors who held State Farm insurance policies. The state court denied the Allisons'

motion to have the jurors removed, and the jury later returned a verdict for the Allisons but awarded less than the Allisons sought. The Allisons appealed the verdict in the state courts, seeking a new trial. The state courts rejected the appeal, and the case was remanded for consideration of fees and costs. The Allisons' motion for fees was denied and the Washington Supreme Court and the U.S. Supreme Court denied further review.

The Allisons thereafter filed this suit in the United States District Court for the Western District of Washington, alleging that the state court had violated their constitutional rights under the Fifth, Sixth, Seventh, and Fourteenth Amendments by permitting State Farm customers to sit on the jury. The complaint makes few allegations relating to State Farm, referring mostly to the actions and decisions of the state courts. Among other things, the complaint seeks damages claimed in the original state court suit, the attorney fees they sought in the state-court litigation, an order for a new trial in the state courts, and remand to the state courts for "all possible remedies and relief."

The district court granted State Farm's motion to dismiss because it concluded that it lacked jurisdiction and that the Allisons had failed to state a claim against State Farm.

A district court's decision to grant a motion to dismiss pursuant to Rule 12(b)(6) is reviewed de novo, *Decker v. Advantage Fund, Ltd.*, 362 F.3d 593, 595-96 (9th Cir. 2004), as are dismissals pursuant to the *Rooker-Feldman* doctrine, *Maldonado v. Harris*, 370 F.3d 945, 949 (9th Cir. 2004).

Federal district courts lack jurisdiction to hear claims that are actually attempted appeals of state court judgments. *See Dist. of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S. Ct. 149, 68 L. Ed. 362 (1923). When a case is a forbidden "de facto appeal," the district court lacks jurisdiction over all issues which are "inextricably intertwined" with an issue resolved by the predicate decision of the state court. *See Noel v. Hall*, 341 F.3d 1148, 1158 (9th Cir. 2003).

We conclude that the Allisons have brought a de facto appeal of the state court judgment. They have at times even argued that they have a right to appeal a state court judgment in the federal district courts, contrary to *Rooker-Feldman*. Their claims are inextricably intertwined with the de facto appeal; in fact, the Allisons' complaint is directed largely at the alleged errors in the state court, [*4] which have been considered and rejected on direct appeal in the state court system, with the U.S. Supreme Court declining review thereafter.

The Allisons cite to cases from outside this circuit that hold, in substance, that *Rooker-Feldman* does not apply where the plaintiff asserting claims in the federal district court did not have a reasonable opportunity to raise the relevant issues in the state court proceedings. We have recognized similar limitations on *Rooker-Feldman*. *See, e.g., Kougasian v. TMSL, Inc.*, 359 F.3d 1136, 1140-41 (9th Cir. 2004) (concluding that a suit alleging extrinsic fraud in a state court suit is not barred by *Rooker-Feldman*). The principle in such cases has no application here, because the Allisons had

the opportunity to raise and did raise in prior state court litigation the issues now asserted. The mere fact that plaintiffs allege that errors were made in state court proceedings does not give them a right to seek redress in the federal district courts.

The district court correctly determined that it lacked jurisdiction under *Rooker-Feldman.*[1]

AFFIRMED.

Footnotes

*This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

**The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

1Because the action was correctly dismissed on that basis, we need not consider whether the district court also correctly dismissed the action for failure to state a claim or for other jurisdictional failures.

CASE NO. C06-0522RSM
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JAMES ALLISON and FLORA ALLISON, Plaintiffs,
v.
STATE FARM MUTUAL AUTO INSURANCE COMPANY, Defendant.

ORDER OF DISMISSAL

I. INTRODUCTION

This matter comes before the Court on defendant's Motion to Dismiss. (Dkt. #5). On April 13, 2006, plaintiffs filed a Complaint alleging that the King County District Court erred in failing to seat an impartial jury to hear their case and that King County District Court erred in denying Flora Allison attorney fees. (Dkt. #1 at 5-6). Although plaintiffs do not actually identify the particular state or federal Constitutional Amendment or statute allegedly violated, plaintiffs base their causes of action on the "United States Constitution due process rights to an impartial jury," "Washington constitutional rights to an impartial jury ... and statutes requiring the same." (Dkt. #1 at 8). They ask this Court to award all reasonable attorney fees and costs incurred by Flora Allison, or in the alternative, a new trial. (Dkt. #1 at 20).

On June 20, 2006, defendant filed a Motion to Dismiss pursuant to Rules 12(b)(1), (4) and (6) of the Federal Rules of Civil Procedure. Defendant argues that this Court should dismiss the complaint because:

(1) it lacks jurisdiction to review state court decisions; (2) it lacks jurisdiction because defendant did not violate plaintiff's constitutional rights under color of state law; (3) defendant is immune from civil liability for its litigation positions; (4) plaintiff's attorney fees claims are barred by *res judicata; (5)* plaintiff's jury selection claims are barred by the Washington statute of limitations; (6) plaintiffs fail to state a claim upon which relief can be granted; and (7) process is deficient because plaintiffs have not properly named defendant.

Plaintiffs have filed an opposition brief, and defendant has filed its reply. (Dkts. #6 and #8). The Court has reviewed the briefs, along with the remainder of the record. For the reasons discussed below, the Court agrees with defendant and DISMISSES plaintiff's case.

II. DISCUSSION

A. *Standards of Review under 12(b)(1) and 12(b)(6)*[1]

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) addresses the court's subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). Federal courts are courts of limited jurisdiction. *Kokkonen v. Guardian Life* Ins. Co., 511 U.S. 375, 377 (1994). They possess only that power authorized by United States Constitution and statute, which is not to be expanded by judicial decree. Id. The burden of establishing the subject matter jurisdiction rests upon the party asserting jurisdiction. Id. When considering a motion to dismiss pursuant to Rule 12(b)(1), the Court is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to

resolve factual disputes concerning the existence of jurisdiction. *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir.1988).

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) seeks dismissal of a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). Under Rule 12(b)(6), the Court must dismiss a complaint if plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002); *Love v. United States*, 915 F.2d 1242, 1245 (9th Cir. 1989). In deciding a motion to dismiss, the Court accepts as true all material allegations in the complaint and construes them in the light most favorable to the plaintiff. *See Newman v. Sathyavaglswaran*, 287 F.3d 786, 788 (9th Cir. 2002); *Associated Gen. Contractors v. Metro. Water Dist.*, 159 F.3d 1178, 1181 (9th Cir. 1998). However, conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss. *Associated Gen. Contractors*, 159 F.3d at 1181.

B. Lack of Jurisdiction

Plaintiffs' Complaint has failed to establish jurisdiction in this Court for two reasons. As a threshold matter, the court first notes that plaintiffs have failed to adequately demonstrate the requisite amount in controversy. In the Complaint, plaintiffs allege in conclusory fashion that their damages "exceeds $75,000." (Dkt. #1 at 20). While plaintiffs list the damages they have allegedly suffered, they provide no factual support for any of those damages in the Complaint. Thus, it is not clear to the Court that

the amount in controversy has been met, *see* 28 U.S.C. § 1332 (setting a $ 75,000 amount in controversy threshold for diversity jurisdiction), and plaintiffs make no such demonstration in any of their subsequent briefing. *See McCauley v. Ford Motor Co.*, 264 F. 3d 952, 957 (9th Cir. 2001) (the party asserting diversity jurisdiction bears the burden of establishing by a preponderance of the evidence that the amount in controversy exceeds $ 75,000). Thus, the Court finds that plaintiffs have not met their burden of establishing that more than $75,000 is in dispute.

Second, even if plaintiffs had demonstrated the requisite amount in controversy, they have failed to establish proper subject matter jurisdiction over the merits of this case. Plaintiffs state as the basis of jurisdiction in this Court:

> Federal Court jurisdiction to review a highest state court decision here is invoked by this being a case in law and equity consisting of the right of the parties arising under the Constitution of the United States as its correct decision depends on the construction of the Constitution.

(Dkt. #1 at 2). This statement does not properly invoke the jurisdiction of this Court.

It has long been settled that a federal district court has no jurisdiction to review a state court decision. *See Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 285-86 (1970); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416 (1923). In *Atlantic Coast Line*, the Supreme Court explicitly stated that "the lower federal courts ... were not given

any power to review directly cases from the state courts, and they have not been given such powers since that time." *Atlantic Coast Line*, 398 U.S. at 286.

Plaintiffs argue that there are actually "numerous bases for jurisdiction" in this Court, and that they are not simply asking for a review of the state court proceedings. (Dkt. #6). However, their Complaint belies that argument. As the Court noted above, the Complaint fails to allege a violation of any particular federal or state Constitutional Amendment or federal or state statute, other than general "due process" violations. Indeed, the majority of the Complaint appears to simply reiterate legal arguments made in the state courts pertaining to potential jury bias.

Moreover, several of the constitutional bases for jurisdiction asserted in plaintiffs' opposition are inapplicable to this case and do not apply to civil cases. For example, the Fifth and Seventh Amendments limit powers exercised by the United States government, not state governments. *Chapin v. Fye*, 179 U.S. 127 (1900). In addition, the Sixth Amendment by its own terms applies only to criminal prosecutions, and plaintiffs were involved in civil litigation. Accordingly, the Court finds that plaintiffs have failed to demonstrate subject matter jurisdiction, and will dismiss the Complaint on that basis.

C. Failure to State a Claim

Even if plaintiffs had managed to demonstrate proper jurisdiction in this Court, plaintiffs' Complaint fails to allege a cause of action upon which relief can be granted. Plaintiffs have named State Farm Auto

Insurance Company as the defendant in this action, yet fail to allege a single cause of action against it. Indeed, as noted above, the majority of the Complaint appears to simply reiterate legal arguments that plaintiffs apparently made in the state courts pertaining to jury bias, and then requests that this Court review the decisions of the state courts on those issues. The only allegations of harm to plaintiffs appear to be asserted against the individual judge in the state district court proceedings, the jury in those proceedings, and the subsequent courts that decided plaintiffs' appeals.

Plaintiffs do assert in the Complaint that their damages occurred as a "result of the defendant and the positions it has taken in litigation throughout the history of this matter." (Dkt. #1 at 20). However, Washington State has established absolute immunity from liability based on words spoken or written in litigation, as long as those words are pertinent or material to the litigation. *See Johnston v. Schlarb*, 7 Wn.2d 528, 540 (1941). Plaintiffs fail to demonstrate that defendant's litigation positions were not pertinent or material to the litigation.

Finally, the Court finds no proper claim under the Fourteenth Amendment, which states in pertinent part: "No State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. In this case, defendant was not a state actor, it was a private party to a civil lawsuit. Moreover, plaintiffs raise no specific allegations in their Complaint with

respect to defendant's conduct during the trial, other than the fact that defendant took certain litigation positions. Accordingly, the Court dismisses the Complaint on this basis as well.

III. CONCLUSION

Having reviewed defendant's motion, plaintiff's opposition, defendant's reply, and the remainder of the record, the Court does hereby ORDER:

(1) Defendant's Motion to Dismiss (Dkt. #5) is GRANTED, and this case is DISMISSED.

(2) The Clerk is directed to send a copy of this Order to all counsel of record. DATED this 17th day of August, 2006.

RICARDO S. MARTINEZ
UNITED STATES DISTRICT JUDGE

Footnote

[1]Although defendant has also argued insufficiency of process under Rule 12(b)(4) in order to preserve that defense, *see* Fed. R. Civ. P. 12(h)(1) (stating that the failure to raise the issue of personal jurisdiction in the first responsive pleading constitutes a waiver of that issue), the Court grants this motion on other bases, and therefore, does not address that argument.

No. 06-35788

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES ALLISON; FLORA ALLISON,
Plaintiffs - Appellants,
v.
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Defendant - Appellee.

FILED MAR 24 2008

Before: FISHER, GOULD, and IKUTA, Circuit Judges.

The panel voted to deny Appellant's Petition for Rehearing and also voted to deny Appellant's Petition for En Banc Rehearing.

The full court has been advised of Appellant's Petition for En Banc Rehearing and no judge of the court has requested a vote on the Petition for En Banc Rehearing. Fed. R. App. P. 35.

Appellant's Petition for Rehearing and the Petition for En Banc Rehearing are DENIED.

190

FILED
JUL 24 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(2)

No. 07-1600

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES E. ALLISON and FLORA ALLISON,
Petitioners,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Respondent.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

---

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MICHAEL S. ROGERS
Counsel of Record
REED McCLURE
TWO UNION SQUARE
601 UNION ST., SUITE 1500
SEATTLE, WA 98101-1363
(206) 292-4900

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent, whose correct name is State Farm Mutual Automobile Insurance Company, is an Illinois Corporation. It has no parent corporation, and no publicly held company owns more than 10% of its stock.

TABLE OF CONTENTS

Page

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6 i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

JURISDICTION 1

STATEMENT OF THE CASE 1

REASONS WHY PETITION SHOULD BE DENIED 4

A. THE NINTH CIRCUIT CORRECTLY HELD THE DISTRICT COURT HAD NO JURISDICTION TO REVIEW STATE COURT DECISIONS 4

B. PETITIONERS ARE NOT CHALLENGING WASHINGTON'S JURY SELECTION PROCESS 6

C. PETITIONERS HAD AMPLE OPPORTUNITY TO RAISE THEIR FEDERAL CLAIMS IN STATE COURT 7

D. EVEN IF *ROOKER-FELDMAN* DID NOT APPLY, THE RESULT WOULD BE THE SAME BECAUSE PETITIONERS HAVE NOT ALLEGED STATE ACTION BY STATE FARM 10

E. EVEN IF *ROOKER-FELDMAN* DID NOT APPLY, THE RESULT WOULD BE THE SAME BECAUSE PETITIONERS § 1983 CLAIM IS BARRED BY THE STATUTE OF LIMITATIONS 14

CONCLUSION 15

TABLE OF AUTHORITIES

Cases

Page

Adickes v. S. H. Kress & Co., 398 U.S. 144, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970)..... 11

District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983)..... 1, 4, 5, 6, 7, 8, 10, 14

Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991)..... 11, 12

Exxon Mobil Corp. v. Saudi Basic Industries Corp., 544 U.S. 280, 125 S. Ct. 1517, 161 L. Ed. 2d 454 (2005)..... 5

Georgia v. McCollum, 505 U.S. 42, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992)..... 12

Long v. Shorebank Development Corp., 182 F.3d 548 (7th Cir. 1999)..... 8, 9

Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982)..... 12, 13

Morales v. City of Los Angeles, 214 F.3d 1151 (9th Cir. 2000)..... 14

Noel v. Hall, 341 F.3d 1148 (9th Cir. 2003)..... 7

Owens v. Okure, 488 U.S. 235, 109 S. Ct. 573, 102 L. Ed. 2d 594 (1989) 14

Petcu v. State, 121 Wn. App. 36, 86 P.3d 1234, *rev. denied*, 152 Wn.2d 1033 (2004) 14

Rooker v. Fidelity Trust Co., 263 U.S. 413, 44 S. Ct. 149, 68 L. Ed. 362 (1923) 1, 4, 5, 6, 7, 8, 10, 14

Wilson v. Garcia, 471 U.S. 261, 105 S. Ct. 1938, 85 L. Ed. 2d 254 (1985) 14

Wood v. Orange County, 715 F.2d 1543 (11th Cir. 1983) 8

Constitutions

U.S. CONST. amend. V 1

U.S. CONST. amend. VI 1

U.S. CONST. amend. VII 1

U.S. CONST. amend. XIV 1, 4, 13

WASH. CONST. art 1, § 3 9

Statutes

28 U.S.C. § 1254(1) 1

28 U.S.C. §1332 1

28 U.S.C. §1343(a)(3) 1, 11

42 U.S.C. § 1983 ..... 10, 12, 14

WASH. REV. CODE §4.16.080(2) 14

WASH. REV. CODE §4.44.170 7

WASH. REV. CODE §4.44.180 7

JURISDICTION

Petitioners seek review of a decision of the Ninth Circuit court of appeals affirming a federal district court decision. This case did not originate in state court. This court already denied certiorari of the separate state court proceeding. Jurisdiction here is based on 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioners alleged in their complaint in federal district court that in a different lawsuit, a Washington state court erred in seating certain jurors over their objections. Petitioners alleged their constitutional rights were violated. Petitioners asked the federal district court to review those decisions.

The district court dismissed petitioners' complaint for lack of jurisdiction and failure to state a claim. (Petitioners' App. at 5a) The district court lacked federal question jurisdiction to review a state court decision under the *Rooker-Feldman* doctrine. The district court lacked jurisdiction under 28 U.S.C. § 1343(a)(3) and the Fourteenth Amendment to the United States Constitution because State Farm did not act under color of state law. The Fifth and Seventh Amendments provided no jurisdiction because they limit only powers excercised by the federal government, and the Sixth Amendment provided no jurisdiction because it applies only to criminal prosecutions. The district court lacked diversity jurisdiction because petitioners made no showing of the amount in controversy required by 28 U.S.C. § 1332.

The Ninth Circuit Court of Appeals affirmed in an unpublished memorandum decision. (Id. at 1a)

Petitioners alleged in their complaint that petitioner James Allison was involved in an auto accident. State Farm denied coverage. Petitioners sued State Farm in Washington State district court. (Record 4-5 – Complaint pp. 3-4)

At trial in June 2001, petitioners' lawyer allegedly objected to the presence of State Farm policyholders on the jury. The judge allowed them to stay on the jury "despite strenuous objection and motions" by petitioners' counsel. (Record 4, 9-12 – Complaint pp. 3, 8-11) Petitioners failed to put their juror challenges on the record. (Appellants' Ninth Circuit Brief at 7, 8)

At trial, the jury found State Farm breached its contract and had to provide coverage for a portion of James Allison's losses. Petitioners appealed to superior court, which affirmed the judgment. The Court of Appeals and Washington Supreme Court denied review. (Record 5 – Complaint p. 4)

The matter was remanded back to state district court, where the court denied the request of both petitioners for attorney fees. (Record 5-6 – Complaint pp. 4-5) The court denied the motion for fees because of misrepresentations made in connection with the insurance claim investigation. The court ruled that this conduct was inequitable, breached the contract, violated public policy, and prejudiced State Farm. (Record 60-64)[1]

---

[1] The district court considered the decision of the state district court denying petitioners' motion for attorney's fees. (Record 60-64) Petitioners referred extensively to this document in their complaint. (Record 5-6, 18 – Complaint pp. 4-5, 17)

> It is abundantly clear from the trial record in this case that Plaintiffs have come before this court requesting attorney fees and costs with "unclean hands." The material misrepresentations of facts and circumstances made by Plaintiffs to Defendant in connection with the insurance claim investigation of purported damage to Plaintiffs' vehicle violated the terms of the insurance contract, as well as the public policy of this state and were prejudicial to the Defendant. None of the factors set forth in the Olympic Steamship case to form an [sic] basis for an award of attorney fees are present in this case. Plaintiffs' own acts preclude an award of attorney fees under the equitable grounds upon which the Olympic Steamship case is based.

(Record 64)

Petitioners appealed again to superior court. The superior court affirmed. The Court of Appeals and Washington Supreme Court denied review. (Record 5-6, 18 – Complaint pp. 4-5, 17)

Petitioners filed a petition for certiorari with the United States Supreme Court on the issues of "fair juries, jury thinking on misrepresentation without ever being asked to make such a finding, and fees to a separate party spouse." The Supreme Court denied certiorari. (Record 6 – Complaint p. 5)

Petitioners complained their due process rights under the United States Constitution were violated because the jury was biased. (Record 7, 9 –

Complaint pp. 6, 8) They complained they were damaged by "the positions [State Farm] has taken in litigation throughout the history of this matter, and its failure to provide full insurance coverage and pay for all of Plaintiffs attorney fees and costs." (Record 21 – Complaint p. 20)

Petitioners did not plead any specific cause of action against State Farm. Instead, they asserted that the federal district court had "jurisdiction to review a highest state court decision." (Record 3 – Complaint p. 2) They asked the district court to order a new trial, and to "remand to the state courts for all possible remedies and relief." (Record 22 – Complaint p. 21)

REASONS WHY PETITION SHOULD BE DENIED

A. THE NINTH CIRCUIT CORRECTLY HELD THE DISTRICT COURT HAD NO JURISDICTION TO REVIEW STATE COURT DECISIONS.

The Ninth Circuit correctly held that under the *Rooker-Feldman* doctrine, the district court had no jurisdiction to review state court decisions. In *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S. Ct. 149, 68 L. Ed. 362 (1923), the plaintiff filed an action in federal district court seeking to do precisely what petitioners attempt to do in this action. They asked the court to rule that a state court judgment was null and void because it was rendered and affirmed in violation of the due process and equal protection clauses of the Fourteenth Amendment. The district court held it had no jurisdiction, and this Court affirmed.

> Under the legislation of Congress, no court of the United States other than this court could entertain a proceeding to reverse or modify the judgment for errors of that character. . . . To do so would be an exercise of appellate jurisdiction. The jurisdiction possessed by the District Courts is strictly original.

Rooker, 263 U.S. at 416 (citations omitted).

In *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, 125 S. Ct. 1517, 161 L. Ed. 2d 454 (2005), this Court further defined the parameters of the doctrine. *Rooker-Feldman* applies to "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon*, 544 U.S. at 284.

This case falls squarely within *Rooker-Feldman*. Petitioners lost in state court. They petitioned this court for review, and were denied. They later filed suit in federal court complaining they were injured by entry of the state court judgment, because it was based on a jury verdict that violated their right to due process. They asked the federal court to "review" the state court judgment, and reverse it. In their brief opposing State Farm's motion to dismiss, they stated:

> State Farm does not dispute the right of the United States Supreme Court here earlier to review the state court decisions through the highest state court. This was done here, but certiorari was denied. Now the review for constitutional violations under federal

> practice can start again at the United States District Court level, and if necessary, reviewed through the circuit courts of appeals and then back to the United States Supreme Court. This . . . is our system of checks and balances among the court systems to right United States Constitutional and statutory wrongs imposed through the state system.

(Record 68-69) Petitioners also asserted that the district court had authority to "order a new trial or order the state court system to review the various issues." (Record 77)

Petitioners' first question presented again asserts that "federal courts have jurisdiction to review state court decisions." (Petition for Certiorari at i) Under *Rooker-Feldman*, the federal district court had no jurisdiction to conduct such a review. The Court of Appeals properly affirmed dismissal of petitioners' complaint.

B. PETITIONERS ARE NOT CHALLENGING WASHINGTON'S JURY SELECTION PROCESS.

Petitioners assert that the Ninth Circuit's decision conflicts with a Fourth Circuit case because *Rooker-Feldman* divests a district court of jurisdiction to review a state court decision, but not to consider a challenge to the constitutionality of the process by which a state court decision was reached. However, petitioners have not claimed that Washington's jury selection procedures are unconstitutional. Instead, petitioners asserted that the state judge "simply violated the state law

regarding impartial jury selection." (Appellants' Ninth Circuit Brief at 16) They claim their injury was caused by "the trial court's decision." (Petition for Certiorari at 16) Petitioners point to no Washington procedure that prevented them from challenging prospective jurors based on bias.

Indeed, Washington law expressly permits litigants to challenge for cause prospective jurors who are biased. WASH. REV. CODE §4.44.170. Bias is defined to include an interest on the part of the juror in the event of the action, or the principal questions therein. WASH. REV. CODE §4.44.180. Petitioners even quote these statutes in their petition for certiorari, at pages 6-7. Petitioners do not identify any state statute or rule they claim is unconstitutional.

Petitioners simply asserted that the state court judge made the wrong decision under Washington's procedures. They asked the district court to "review" that decision. The Ninth Circuit correctly held the district court had no jurisdiction under *Rooker-Feldman*.

C. PETITIONERS HAD AMPLE OPPORTUNITY TO RAISE THEIR FEDERAL CLAIMS IN STATE COURT.

Petitioners assert that the Ninth Circuit's decision conflicts with decisions by the Seventh Circuit and other courts because *Rooker-Feldman* does not apply where a litigant had no reasonable opportunity to raise federal constitutional claims in state court. This argument is surprising because the Ninth Circuit has approved the formulation of *Rooker-Feldman* used by the Seventh Circuit. *Noel v. Hall*, 341 F.3d 1148, 1164-65 (9th Cir. 2003). In fact,

in this case the Ninth Circuit expressly recognized this limitation on *Rooker-Feldman*, and ruled that petitioners did have a reasonable opportunity to raise in state court the issues they raise now. (Petitioners' App. at 3a-4a) There is no conflict with other circuits.

Petitioners' reliance on *Wood v. Orange County*, 715 F.2d 1543, 1545-46 (11th Cir. 1983), is misplaced. There, liens were entered without any prior notice to the federal court plaintiffs. Here, petitioners had notice. They filed the state court action. They demanded the jury. The trial was for their own claims against State Farm.

Petitioners' situation bears no comparison to that of the tenant in *Long v. Shorebank Development Corp.*, 182 F.3d 548 (7th Cir. 1999). There, the tenant brought a claim for wrongful eviction in violation of federal and state laws. She alleged that a landlord evicted her for nonpayment of rent at an ex parte hearing. She claimed the landlord's attorney tricked her into signing a document she was told would preclude the landlord from taking action against her to obtain a judgment, but was in fact consent to entry of judgment against her.

The Seventh Circuit held that *Rooker-Feldman* is jurisdictional, and broadly "applies not only to claims that were actually raised before the state court, but also to claims that are inextricably intertwined with state court determinations." *Long*, 182 F.3d at 554-55. However, "an issue cannot be inextricably intertwined with a state court judgment if the plaintiff did not have a reasonable opportunity to raise the issue in the state court proceedings." *Id.* at 558. Interestingly, the court held that the alleged "chicanery" of the landlord's attorney was not enough to show the tenant was denied a reasonable

opportunity to raise her claims in state court. The tenant would have to point to some factor independent of the actions of the opposing party. *Id.* The tenant satisfied this requirement because Illinois law did not allow a tenant to raise matters unrelated to possession in a forcible entry and detainer proceeding. *Id.* at 559.

In contrast to the tenant in *Long*, petitioners had ample opportunity to argue to the state court that their due process rights were violated by the denial of their juror challenges. Petitioners attached as exhibits to their complaint twenty pages of transcript from two separate state court hearings where their attorney vigorously voiced his displeasure with the court's denial of his clients' challenges for cause. (Record 24-43) Their attorney cited case law to the state judge to support his position that Washington law required that the court grant his juror challenges. (Record 34, 41; *See also* Appellants' Ninth Circuit Brief at 8)

The Washington Constitution provides protections at least as broad as the United States Constitution. It provides that no person shall be deprived of life, liberty, or property without due process of law. WASHINGTON CONSTITUTION, art. 1, § 3. Petitioners quote this provision in their petition for certiorari, at 6. Petitioners fail to articulate any reason why they were unable to raise constitutional due process protections under the federal or state constitutions with the Washington courts.

Petitioners' comparison of this case to situations where a judge was biased or bribed is specious. Petitioners complain here of the denial of their juror challenges. That denial was made by the state court judge, not the allegedly biased jurors.

Petitioners do not allege that the judge who denied their juror challenges was biased. Petitioners had every opportunity to raise their constitutional challenges to the state court judge.

If petitioners failed to raise a constitutional issue, their failure was due to their own omission, not to lack of opportunity. Such failure would not alter the federal court's lack of jurisdiction. *See District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 483 n.16, 103 S. Ct. 1303, 1316 n.16, 75 L. Ed. 2d 206 (1983). However, petitioners told the federal district court that they raised their constitutional issues before the state courts. They admitted that "all the constitutional issues here have been in litigation for years." (Record 79) They raised the constitutional issues before the state appellate courts, and before the United States Supreme Court on their petition for certiorari. (Record 78)

Therefore, the Ninth Circuit's decision does not conflict with other cases that address situations where litigants had no reasonable opportunity to raise federal constitutional claims in state court.

D. EVEN IF *ROOKER-FELDMAN* DID NOT APPLY, THE RESULT WOULD BE THE SAME BECAUSE PETITIONERS HAVE NOT ALLEGED STATE ACTION BY STATE FARM.

As the district court held, the result would be the same even if *Rooker-Feldman* did not apply. Petitioners' claim under 42 U.S.C. § 1983 would fail because they have not alleged state action by State Farm. Therefore, even if there was a conflict between the circuits, this Court should deny certiorari.

Section 1983 requires proof of two elements. First, the plaintiff must prove that the defendant has

deprived the plaintiff of a right secured by the Constitution and laws of the United States. Second, the plaintiff must show that the defendant deprived him of this right under color of state law. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 150, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970). The "under color of any State law" requirement is jurisdictional. 28 U.S.C. § 1343(a)(3).

Neither element is present. First, petitioners alleged that the state court, not State Farm, deprived them of due process when the court denied their requests to strike biased jurors. Petitioners merely alleged they were harmed by State Farm's litigation positions. As a matter of law, a private party that takes litigation positions in a civil lawsuit against another private party is not engaging in state action, or acting under color of state law. The only exception found by the courts is where a private litigant affirmatively exercises discriminatory peremptory challenges.

> Here, as in most civil cases, the initial decision whether to sue at all, the selection of counsel, and any number of ensuing tactical choices in the course of discovery and trial may be without the requisite governmental character to be deemed state action. That cannot be said of the exercise of peremptory challenges, however; when private litigants participate in the selection of jurors, they serve an important function within the government and act with its substantial assistance. If peremptory challenges based on race were permitted, persons could be required by

> summons to be put at risk of open and public discrimination as a condition of their participation in the justice system. The injury to excluded jurors would be the direct result of governmental delegation and participation.

Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614, 627-28, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991). *See also Georgia v. McCollum*, 505 U.S. 42, 54, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992) ("The exercise of a peremptory challenge differs significantly from other actions taken in support of a defendant's defense. In exercising a peremptory challenge, a criminal defendant is wielding the power to choose a quintessential governmental body").

Petitioners did not allege any impropriety with peremptory challenges exercised by State Farm. Instead, petitioners allege that the trial court's denial of petitioners' own challenges for cause denied them due process. State Farm took no action in making petitioners' challenges for cause, nor did State Farm have authority to deny them. The state court made the decision to deny petitioners' juror challenges.

Petitioners' reliance on *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 924, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982) is misplaced. In *Lugar*, the defendant sought prejudgment attachment under a procedure created by a Virginia statute. The procedure allowed a party to seize property by ex parte petition, without notice to the owner. A state court clerk issued a writ of attachment, and a county sheriff executed the writ.

The owner sued the defendant under 42 U.S.C. § 1983, alleging the defendant acted jointly with the state to deprive him of his property without due

process of law. This Court held that private use of unconstitutional state procedures with the help of state officials constitutes state action for purposes of the Fourteenth Amendment, and therefore the challenged conduct was "under color of state law." To act under color of state law, the private party must 1) deprive the plaintiff of a constitutional right through the exercise of a right or privilege having its source in state authority; and 2) be appropriately characterized as a "state actor." The court noted that a cause of action alleging violation of a state statute was insufficient. However, the claim alleged in that case, that a private party utilized an unconstitutional state procedure in joint participation with state officials, did satisfy the two-part test. *Lugar*, 457 U.S. at 939-41.

This case is very different. First, State Farm did not exercise a right or privilege having its source in state authority. Petitioners alleged they "sued State Farm for coverage," and "the judge allowed [jurors] to stay on the jury despite strenuous objection and motions by Petitioner's counsel before the actual trial began." (Record 4 – Complaint p. 3) Petitioners sued State Farm in their choice of forum, state district court. Petitioners challenged jurors. The court denied their challenges.

State Farm did not choose to be sued. State Farm did not make a motion asking the court to seat biased jurors. Petitioners' allegation that State Farm took litigation positions opposing their objections and motions is insufficient to establish that State Farm violated their rights, or acted under color of state law. The complaint failed to state a claim upon which relief may be granted, and failed to establish jurisdiction.

E. EVEN IF *ROOKER-FELDMAN* DID NOT APPLY, THE RESULT WOULD BE THE SAME BECAUSE PETITIONERS § 1983 CLAIM IS BARRED BY THE STATUTE OF LIMITATIONS.

Even if the district court had jurisdiction, the result would be the same because petitioners' claim under 42 U.S.C. § 1983 is barred by Washington's three-year personal injury statute of limitations. The jury was selected in the state court action on June 25 and 26, 2001. (Record 24, 30) Judgment was entered on the verdict on August 2, 2001. (Record 62) Appellants filed this action on or about April 13, 2006, more than four years later. (Record 99) This claim is time barred.

The state statute of limitations for personal injury actions applies to actions for damages under 42 U.S.C. § 1983. *Wilson v. Garcia*, 471 U.S. 261, 105 S. Ct. 1938, 85 L. Ed. 2d 254 (1985). Where state law provides multiple statutes of limitations for personal injury actions, courts use the general or residual statute for personal injury actions. *Owens v. Okure*, 488 U.S. 235, 109 S. Ct. 573, 102 L. Ed. 2d 594 (1989). In Washington, personal injury actions are governed by a three-year statute of limitations. WASH. REV. CODE §4.16.080(2); *Petcu v. State*, 121 Wn. App. 36, 68, 86 P.3d 1234, *rev. denied*, 152 Wn.2d 1033 (2004).

"Although state law determines the length of the limitations period, federal law determines when a civil rights claim accrues." *Morales v. City of Los Angeles*, 214 F.3d 1151, 1153-54 (9th Cir. 2000). Where the plaintiff alleges that a civil rights violation caused him to lose a lawsuit, the civil rights cause of action accrues on the date judgment was entered in that lawsuit. *Id.* at 1154. Since

petitioners sued more than three years after entry of judgment, their claim is time barred.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

DATED this 24th day of July, 2008.

Respectfully submitted,

MICHAEL S. ROGERS
Counsel of Record
REED McCLURE
TWO UNION SQUARE
601 UNION ST., SUITE 1500
SEATTLE, WA 98101-1363
(206) 292-4900